No. 61107-1-I, State v. Hagler

ELLINGTON, J. (Dissenting) — I agree that any instructional error was harmless under the facts of this case and otherwise join in the opinion, with one exception: I respectfully dissent from the majority's conclusion that Hagler must be resentenced under State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008). I believe Linerud injects confusion into the sentencing process and unnecessarily restricts the sentencing court's ability to impose sentences the legislature has expressly authorized. I would remand solely for correction of the scrivener's error and to permit the sentencing court to clarify Hagler's sentences consistent with our decision in State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004).

At the outset, I emphasize that the following analysis addresses the current statutory scheme, which was in effect at the time of Hagler's sentencing. In response to the budget emergency, our legislature has recently enacted significant changes to the provisions governing the supervision of offenders. See Engrossed Substitute S.B. 5288, 61st Leg., Reg. Sess. (Wash. 2009). Among other things, the legislature eliminated certain categories of offenders from supervision and replaced community custody ranges with fixed community custody terms. Upon initial review, it appears that the 2009 changes will eliminate or modify several statutory provisions at issue in this case. But similar provisions remain unchanged in other statutes. And most of the concerns that I have with the Linerud approach persist even if some of the specific statutes addressed are no longer valid.

The issue again involves the interplay between the terms of confinement, earned

early release, and community custody and the statutory maximum sentence. For certain specified crimes, in addition to imposing a precise term of confinement, the court must sentence the offender "to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer." RCW 9.94A.715(1). The term of community custody under RCW 9.94A.850 is a range, and does not begin until the offender is released from confinement or transferred to community custody in lieu of earned early release. Id.

Because the Department of Corrections (DOC) determines when and whether to grant earned early release, the sentencing court cannot know when the defendant's term of community custody will begin. See State v. Pharris, 120 Wn. App. 661, 664, 86 P.3d 815 (2004) (potential earned early release award prevented precise determination of community placement term). Thus in some circumstances, as here, the standard range for confinement, combined with the mandatory range for community custody, may theoretically exceed the statutory maximum. Under RCW 9.94A.505(5), "a court may not *impose* a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime" set by the legislature.[1] (Emphasis added.)

[1] In this case, all three of Hagler's sentences theoretically exceeded the statutory maximum: first degree promoting prostitution (120 months plus 9 to 18 months), 120 month maximum; and two counts of second degree identity theft (57 months plus 9 to 18 months), 60 month maximum.

The question is how to ensure this does not in fact occur. In Sloan, the trial court imposed the statutory maximum term of 60 months confinement and 36 to 48 months of community custody. We held this sentence did not violate RCW 9.94A.505(5), noting that if the defendant served the full term of confinement, she would be released without further obligation and that if she earned early release credits, she would be transferred to community custody until the expiration of the maximum term. "In no event will she serve more than the statutory maximum sentence." Sloan, 121 Wn. App. at 223. But because such sentences may generate some administrative uncertainty, we remanded for the sentencing court to minimize this risk by expressly stating the maximum sentence in the judgment and sentence: "[W]hen a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum. Id. at 223–24.

In the five years since Sloan was decided, the other two divisions of this court have agreed that a sentence thus clarified is valid and does not violate RCW 9.94A.505(5). See State v. Vant, 145 Wn. App. 592, 605, 186 P.3d 1149 (2008); State v. Hibdon, 140 Wn. App. 534, 538, 166 P.3d 826 (2007); State v. Torngren, 147 Wn. App. 556, 196 P.3d 742 (2008).[2] We have also acknowledged that Sloan does not

[2] I am not aware that the legislature has amended any provisions in response to the Sloan interpretation of RCW 9.94A.505(5).

provide the only means by which the sentencing court can comply with RCW 9.94A.505(5). See State v. Davis, 146 Wn. App. 714, 192 P.3d 29 (2008) (sentencing court may either clarify sentence in accordance with Sloan or impose exceptional sentence downward).[3]

In Linerud, another panel of this court recently reached a different result. Linerud was convicted of a class C felony, and was sentenced to 43 months of incarceration and 36 to 48 months of community custody. In accordance with Sloan, the court provided in the judgment and sentence that the combined period of incarceration and community custody could not exceed the statutory maximum of 60 months. The Linerud court rejected our approach in Sloan, holding that it results in a sentence that is "indeterminate" because it places the burden on DOC to ensure that an inmate does not serve more than the statutory maximum. Linerud, 147 Wn. App. at 948.

Linerud rests its analysis on the court's obligation under the Sentencing Reform Act to impose a determinate sentence. Id. RCW 9.94A.030(18) defines "determinate sentence" as a sentence "that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision." The Linerud court applied this definition as the standard by which to assess the validity of every sentence:

Because a court may not impose a sentence that exceeds the statutory

[3] Our Supreme Court may address the validity of the Sloan approach in In re Pers. Restraint of Brooks, No. 80704-3, set for argument May 28, 2009.

> maximum and must impose a determinate sentence, it may not sentence a defendant to a term that, on its face, exceeds the statutory maximum and leave to the DOC responsibility for assuring that the sentence is lawful.
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> . . . .
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> In light of the determinate sentencing requirement and the risks of requiring the DOC to ensure the inmate does not serve in excess of his or her maximum sentence, we hold that courts must limit the total sentence they impose to the statutory maximum. It is within the trial court's discretion to determine how much of that sentence is confinement and how much is community custody.

Id. at 950.

I find this analysis problematic for several reasons. First, it emphasizes the definition without considering its legislative context.[4] Second, it construes too narrowly what is meant by "imposing" a sentence. Third, it rests upon distrust of the agency to which the legislature itself has entrusted certain relevant decisions. And fourth, it presents significant practical difficulties for trial courts, which must comply both with the provisions of the act and with Linerud's demand for a "determinate" sentence (that is, one that is exact and free from DOC's involvement).

The determinate sentence definition has been in the Sentencing Reform Act since its enactment in 1981.[5] Although sentences under the SRA are generally

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[4] The court's reasoning has consequences that go beyond the issues associated with the statutory maximum.

[5] Former RCW 9.94A.030(8) (1981) provided: "'Determinate sentence' means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community service work, or dollars or terms of a fine or restitution. The fact that an offender through 'earned early release' can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence."

considered "determinate," i.e., specifying the terms with "exactitude," the legislature has never required that the definition be applied mechanically.[6] From the beginning, the legislature has created exceptions to the general goal of "determinate" sentences,[7] and has regularly adopted sentencing provisions inconsistent with a strict reading of the definition.[8] To state with exactitude the number of days to be served in various types of custody is now largely impossible. Yet the legislature has seen no reason to amend the definition, which strongly suggests that the majority's strict reading is not consistent with legislative intent. Significantly, RCW 9.94A.030(18) does not reference community custody or community placement as an element of a determinate sentence, a fact that Linerud does not address. Cf. In re Pers. Restraint of Caudle, 71 Wn. App. 679, 682, 863 P.2d 570 (1993).

Reading the definition in context, the Sloan approach results in a sentence that is "determinate" because it imposes specific terms for confinement and community custody as required by the act for the offense, and it implements the prohibition against exceeding the statutory maximum. The sentence imposed upon Hagler was exact to the extent the act now allows, and did not violate the prohibition against exceeding the

[6] Currently, the SRA specifies when a sentence must be determinate in only two situations, neither of which is relevant here: RCW 9.94A.535 (sentences outside the standard range) and RCW 9.94A.505(2)(b) (offenses with no specified standard range).

[7] The original provisions governing first time offenders and sex offenders permitted sentences that were at least partially "indeterminate." See D. Boerner, Sentencing in Washington, § 4.1, n.4 (1985).

[8] See, e.g., RCW 9.94A.712 (requiring court to impose an indeterminate sentence, setting maximum and minimum terms, for specified nonpersistent offenders).

statutory maximum.

The Linerud court took the view, however, that Sloan results in an indeterminate sentence because DOC, not the sentencing court, determines the length of the sentence: "Considering both the legal and policy arguments, we hold that a sentence is indeterminate when it puts the burden on the DOC rather than the sentencing court to ensure that the inmate does not serve more than the statutory maximum." Linerud, 147 Wn. App. at 948.

I believe this view is incorrect. The sentencing court determined the length of sentence, *subject to the statutory maximum*. In other words, the sentence imposed *was* the statutory maximum, expressed in terms of confinement and community custody. Uncertainties in the length of both are built into the act. For this and other reasons, the legislature requires DOC to administer every sentence.[9] To do so, DOC must necessarily determine, among other things, an inmate's time served, earned early release credit, date of release from full custody, length of community custody, and discharge date. The statutory maximum release date is an inherent part of such calculations. DOC is prohibited from setting a release date beyond the statutory maximum. Cf. RCW 9.94A.737(4).

Merely tracking relevant dates does not amount to imposing the sentence. I do not see how DOC's determinations in administering a sentence under Sloan are

[9] See, e.g., RCW 9.94A.728 (earned early release credits), 9.94A.625 (tolling community supervision), 9.94A.700 (community placement), 9.94A.760 (legal financial obligations).

substantively different from those required for administering any other sentence under the SRA, whether or not the sentence approaches the statutory maximum. In its essence, the Sloan clarification merely reinforces DOC's existing obligations by calling attention to the risk of exceeding the maximum.

Further, DOC cannot calculate earned early release credit until the defendant begins serving the sentence, and community custody is a mandatory range directly linked to earned early release.[10] In its definition of a determinate sentence, RCW 9.94A.030(18), the legislature expressly provided that "[t]he fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence." The legislature recognized from the beginning that inexactitude as to the actual length of incarceration or the precise date community custody will commence does not render a sentence impermissibly "indeterminate."

Under the Sloan approach, the sentencing court imposes the length of the sentence, subject only to the statutory maximum. Such a sentence is no less determinate than when the combined terms of confinement and community custody precisely equal the statutory maximum.

The Linerud court expressed concern that DOC may overlook or not comply with a handwritten notation on the judgment and sentence. But as a practical matter, the

[10] See RCW 9.94A.728(1) ("The correctional agency shall not credit the offender with earned release credits in advance of the offender actually earning the credits.")

sentencing court will often have to record critical elements of a sentence by hand on the judgment and sentence. Avoiding frequent handwritten notations is a matter of modifying existing sentencing forms. I am not aware that DOC makes a practice of calculating release dates inaccurately, whether they occur before or on the statutory maximum expiration date, but there is nothing in the Linerud approach to warrant against the possibility of miscalculation in an individual case.[11]

By demanding that the sentencing court determine a combination of confinement and community custody that *cannot* exceed the statutory maximum, Linerud injects yet another layer of complexity into an already embrangled process. There appear two possible ways for the beleaguered sentencing court to comply. If the standard range permits, the court may try to anticipate DOC's probable earned early release policy at the relevant time, anticipate the defendant's likely eligibility, and calculate the resulting possible dates for transfer to community custody under various scenarios, so that the confinement and community custody fall within the maximum term.

The ranges will often not permit such adjustments, however. Linerud, for example, received the minimum sentence under the standard range, but the total combined term exceeded the statutory maximum. It would appear, although the

[11] The Linerud court cited In re Pers. Restraint of Dutcher, 114 Wn. App. 755, 60 P.3d 635 (2002), when expressing its uneasiness that DOC would accurately calculate an inmate's release date. But Dutcher and the other cases cited in Linerud involved a legal dispute over the validity of specific DOC policies, not its ability or willingness to carry out the routine calculations required to track the length of every inmate's sentence.

Linerud court did not say so, that on remand the only option for the sentencing court will be an exceptional sentence downward.[12] An exceptional sentence is an approved option in these circumstances, see Davis, 146 Wn. App. at 423–24, but nothing in the act suggests this is the legislature's preferred approach, and it will frequently result in a windfall to the offender.[13] Thus in addition to the practical difficulties and limited utility of this exercise, the Linerud restriction thwarts the legislative intent by making the maximum term unavailable to the sentencing court, even where the sentence, as imposed under Sloan, could be served within the statutory maximum. It seems odd indeed to invoke one legislative provision to curtail others when they are easily harmonized. See In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 818, 177 P.3d 675 (2008) (when ascertaining legislative intent, an appellate court views the sentencing scheme as a whole, attempting to harmonize all relevant provisions).

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[12] In a footnote, the Linerud court suggests that if the sentencing court wants to impose the maximum terms of confinement and community custody, "it may do so under the second option in RCW 9.94A.715(1), which permits it to impose a term of community custody equal to the earned early release time." Linerud, 147 Wn. App. at 950 n.17. But RCW 9.94A.715(1) requires the court to impose community custody "for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), *whichever is longer.*" (Emphasis added.) It thus appears the suggestion in the footnote is incorrect.

[13] Linerud serves as a useful example. His community custody range was 36 to 48 months. If the sentencing court on remand wishes to impose the same period of confinement, it would have to impose 43 months' confinement and an exceptional sentence of 17 months' community custody, for a total of the statutory maximum of 60 months. Linerud would be eligible for 1/3 earned early release at 29 months. If released then, he would serve 17 months in community custody, for a total of 46 months. Under the Sloan approach, he would serve 29 months in custody and 31 months in community custody, for a total of 60 months. Whether an offender receives a windfall under Linerud will likely depend upon earned early release credits.

I am also concerned with the Linerud court's characterization of a judgment and sentence in violation of RCW 9.94A.505(5) as "invalid on its face," a proposition drawn from State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005). The concept of facial validity is generally limited to application of the one year time bar for collateral attacks. See RCW 10.73.090(1) (time bar for collateral attack does not apply if judgment and sentence is not "valid on its face"). Zavala-Reynoso involved a collateral attack under CrR 7.8 and determined that the time bar did not apply to a judgment and sentence that exceeded the statutory maximum. Zavala-Reynoso did not address Sloan or any analogous decision, and Division Three subsequently adopted the Sloan reasoning and expressly acknowledged that Zavala-Reynoso is consistent with Sloan. State v. Hibdon, 140 Wn. App. 534, 538, 166 P.3d 826 (2007) (Sloan and Zavala-Reynoso are both valid "option[s]"). Zavala-Reynoso does not support the proposition that a sentence clarified under Sloan is a judgment and sentence that is invalid on its face.

In my view, when the sentencing court enters a judgment and sentence in accordance with Sloan, it does not impose a sentence exceeding the statutory maximum in violation of RCW 9.94A.505(5). The sentence is valid and is no more "indeterminate" than when all of the same elements will be completed before the statutory maximum.

I therefore respectfully dissent. I would remand for the relief Hagler requested in his brief—the clarification required by Sloan.